

Appendix B

ATP Rule—15 C.F.R. Part 295

Subpart A—General

Sec. 295.1 Purpose.

(a) The purpose of the Advanced Technology Program (ATP) is to assist United States businesses to carry out research and development on high risk, high pay-off, emerging and enabling technologies. These technologies are:

- (1) High risk, because the technical challenges make success uncertain;
- (2) High pay-off, because when applied, they offer significant benefits to the U.S. economy; and
- (3) Emerging and enabling, because they offer wide breadth of potential application and form an important technical basis for future commercial applications.

(b) The rules in this part prescribe policies and procedures for the award of cooperative agreements under the Advanced Technology Program in order to ensure the fair treatment of all proposals. While the Advanced Technology Program is authorized to enter into grants, cooperative agreements, and contracts to carry out its mission, these rules address only the award of cooperative agreements. The program employs cooperative agreements rather than grants because such agreements allow ATP to exercise appropriate management oversight of projects and also to link ATP-funded projects to ongoing R&D at

the National Institute of Standards and Technology wherever such linkage would increase the likelihood of success of the project.

(c) In carrying out the rules in this part, the Program endeavors to put more emphasis on joint ventures and consortia with a broad range of participants, including large companies, and less emphasis on support of individual large companies.

Sec. 295.2 Definitions.

- (a) For the purposes of ATP, the term *award* means Federal financial assistance made under a grant or cooperative agreement.
- (b) The term *company* means a for-profit organization, including sole proprietors, partnerships, limited liability companies (LLCs), or corporations.
- (c) The term *cooperative agreement* refers to a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal Government and the recipient is the transfer of money, property, or services, or anything of value to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and substantial involvement is anticipated between the executive agency, acting for the Federal

Government, and the recipient during performance of the contemplated activity.

- (d) The term *direct costs* means costs that can be identified readily with activities carried out in support of a particular final objective. A cost may not be allocated to an award as a direct cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as an indirect cost. Because of the diverse characteristics and accounting practices of different organizations, it is not possible to specify the types of costs which may be classified as direct costs in all situations. However, typical direct costs could include salaries of personnel working on the ATP project and associated reasonable fringe benefits such as medical insurance. Direct costs might also include supplies and materials, special equipment required specifically for the ATP project, and travel associated with the ATP project. ATP shall determine the allowability of direct costs in accordance with applicable Federal cost principles.
- (e) The term *foreign-owned company* means a company other than a United States-owned company as defined in 295.2(q).
- (f) The term *grant* means a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal Government and the recipient is the transfer of money, property, services, or anything of value to the recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the recipient during performance of the contemplated activity.
- (g) The term *independent research organization* (IRO) means a nonprofit research and development corporation or association organized under the laws of any state for the purpose of carrying out research and development on behalf of other organizations.
- (h) The term *indirect costs* means those costs incurred for common or joint objectives that cannot be readily identified with activities carried out in support of a particular final objective. A cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as a direct cost. Because of diverse characteristics and accounting practices it is not possible to specify the types of costs which may be classified as indirect costs in all situations. However, typical examples of indirect costs include general administration expenses, such as the salaries and expenses of executive officers, personnel administration, maintenance, library expenses, and accounting. ATP shall determine the allowability of indirect costs in accordance with applicable Federal cost principles.
- (i) The term *industry-led joint research and development venture* or *joint venture* means a business arrangement that consists of two or more separately-owned, for-profit companies that perform research and development in the project; control the joint venture's membership, research directions, and funding priorities; and share total project costs with the Federal Government. The joint venture may include additional companies, independent research organizations, universities, and/or governmental laboratories (other than NIST) which may or may not contribute funds (other than Federal funds) to the project and perform research and development. A for-profit company or an independent research organization may serve as an Administrator and perform administrative tasks on behalf of a joint venture, such as handling receipts and disbursements of funds and making antitrust filings. The following activities are not permissible for ATP-funded joint ventures:



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- (1) Exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required to conduct the research and development that is the purpose of such venture;
- (2) Entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production or marketing by any person who is a party to such joint venture of any product, process, or service, other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets; and
- (3) Entering into any agreement or engaging in any other conduct:
 - (i) To restrict or require the sale, licensing, or sharing of inventions or developments not developed through such venture, or
 - (ii) To restrict or require participation by such party in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.
- (j) The term *intellectual property* means an invention patentable under title 35, United States Code, or any patent on such an invention.
- (k) The term *large business* for a particular ATP competition means any business, including any parent company plus related subsidiaries, having annual revenues in excess of the amount published by ATP in the relevant annual notice of availability of funds required by section 295.7(a) of this regulation. In establishing this amount, ATP may consider the dollar value of the total revenues of the 500th company in *Fortune* magazine's Fortune 500 listing.
- (l) The term *matching funds* or *cost sharing* means that portion of project costs not borne by the Federal Government. Sources of revenue to satisfy the required cost share include cash and in-kind contributions. Cash contributions can be from recipient, state, county, city, or other non-federal sources. In-kind contributions can be made by recipients or non-federal third parties (except subcontractors working on an ATP project) and include but are not limited to equipment, research tools, software, and supplies. Except as specified at Sec. 295.25 of this regulation, the value of in-kind contributions shall be determined in accordance with OMB Circular A-110, Subpart C, Section 23. The value of in-kind contributions will be prorated according to the share of total use dedicated to the ATP program. ATP restricts the total value of in-kind contributions that can be used to satisfy the cost share by requiring that such contributions not exceed 30 percent of the non-federal share of the total project costs. ATP shall determine the allowability of matching share costs in accordance with applicable federal cost principles.
- (m) The term *person* shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.
- (n) The term *Program* means the Advanced Technology Program.
- (o) The term *Secretary* means the Secretary of Commerce or the Secretary's designee.
- (p) The term *small business* means a business that is independently owned and operated, is organized for profit, and is not dominant in

the field of operation in which it is proposing, and meets the other requirements found in 13 C.F.R. Part 121.

- (q) The term *United States-owned company* means a for-profit organization, including sole proprietors, partnerships, or corporations, that has a majority ownership or control by individuals who are citizens of the United States.

Sec. 295.3 Eligibility of United States- and Foreign-Owned Businesses.

- (a) A company shall be eligible to receive an award from the Program only if:
- (1) The Program finds that the company's participation in the Program would be in the economic interest of the United States, as evidenced by investments in the United States in research, development, and manufacturing (including, for example, the manufacture of major components or sub-assemblies in the United States); significant contributions to employment in the United States; and agreement with respect to any technology arising from assistance provided by the Program to promote the manufacture within the United States of products resulting from that technology (taking into account the goals of promoting the competitiveness of United States industry), and to procure parts and materials from competitive suppliers; and
 - (2) Either the company is a United States-owned company, or the Program finds that the company is incorporated in the United States and has a parent company which is incorporated in a country which affords to United States-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized under the Program; affords the United States-owned companies local investment

opportunities comparable to those afforded to any other company; and affords adequate and effective protection for the intellectual property rights of United States-owned companies.

- (b) The Program may, within 30 days after notice to Congress, suspend a company or joint venture from continued assistance under the Program if the Program determines that the company, the country of incorporation of the company or a parent company, or the joint venture has failed to satisfy any of the criteria contained in paragraph (a) of this section, and that it is in the national interest of the United States to do so.
- (c) Companies owned by legal residents (green card holders) may apply to the Program, but before an award can be given, the owner(s) must either become a citizen or ownership must be transferred to a U.S. citizen(s).

Sec. 295.4 The Selection Process.

- (a) The selection process for awards is a multi-step process based on the criteria listed in section 295.6. Source evaluation boards (SEB) are established to ensure that all proposals receive careful consideration. In the first step, called "preliminary screening," proposals may be eliminated by the SEB that do not meet the requirements of this Part or the annual *Federal Register* Program announcement. Typical but not exclusive of the reasons for eliminating a proposal at this stage are that the proposal is deemed to have serious deficiencies in either the technical or business plan; involves product development rather than high-risk R&D; is not industry-led; is significantly overpriced or underpriced given the scope of the work; does not meet the requirements set out in the notice of availability of funds issued pursuant to section 295.7; or does not meet the cost-sharing requirement. NIST will also examine proposals that have been submitted to a previous



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competition to determine whether substantive revisions have been made to the earlier proposal, and, if not, may reject the proposal.

- (b) In the second step, referred to as the “technical and business review,” proposals are evaluated under the criteria found in section 295.6. Proposals judged by the SEB after considering the technical and business evaluations to have the highest merit based on the selection criteria receive further consideration and are referred to as “semifinalists.”
- (c) In the third step, referred to as “selection of finalists,” the SEB prepares a final ranking of semifinalist proposals by a majority vote, based on the evaluation criteria in section 295.6. During this step, the semifinalist proposers will be invited to an oral review of their proposals with NIST, and in some cases site visits may be required. Subject to the provisions of section 295.6, a list of ranked finalists is submitted to the Selecting Official.
- (d) In the final step, referred to as “selection of recipients,” the Selecting Official selects funding recipients from among the finalists, based upon the SEB rank order of the proposals on the basis of all selection criteria (section 295.6); assuring an appropriate distribution of funds among technologies and their applications; the availability of funds; and adherence to the Program selection criteria. The Program reserves the right to deny awards in any case where information is uncovered which raises a reasonable doubt as to the responsibility of the proposer. The decision of the Selecting Official is final.
- (e) NIST reserves the right to negotiate the cost and scope of the proposed work with the proposers that have been selected to receive awards. For example, NIST may request that the proposer delete from the scope of work a particular task that is deemed by NIST to be product development or otherwise inappropriate for ATP support.

Sec. 295.5 Use of Pre-Proposals in the Selection Process.

To reduce proposal preparation costs incurred by proposers and to make the selection process more efficient, NIST may use mandatory or optional preliminary qualification processes based on preproposals. In such cases, announcements requesting pre-proposals will be published as indicated in section 295.7, and will seek abbreviated proposals (pre-proposals) that address both of the selection criteria, but in considerably less detail than full proposals. The Program will review the pre-proposals in accordance with the selection criteria and provide written feedback to the proposers to determine whether the proposed projects appear sufficiently promising to warrant further development into full proposals. Proposals are neither “accepted” nor “rejected” at the pre-proposal stage. When the full proposals are received in response to the notice of availability of funds described in section 295.7, the review and selection process will occur as described in section 295.4.

Sec. 295.6 Criteria for Selection.

The evaluation criteria to be used in selecting any proposal for funding under this program, and their respective weights, are listed in this section. No proposal will be funded unless the Program determines that it has scientific and technological merit and that the proposed technology has strong potential for broad-based economic benefits to the nation. Additionally, no proposal will be funded that does not require Federal support, that is product development rather than high-risk R&D, that does not display an appropriate level of commitment from the proposer, or does not have an adequate technical and commercialization plan.

(a) Scientific and Technological Merit (50%)

The proposed technology must be highly innovative. The research must be challenging, with high technical risk. It must be aimed at overcoming an important problem(s) or

exploiting a promising opportunity. The technical leverage of the technology must be adequately explained. The research must have a strong potential for advancing the state of the art and contributing significantly to the U.S. scientific and technical knowledge base. The technical plan must be clear and concise; clearly identify the core innovation, the technical approach, major technical hurdles, and the attendant risks; and clearly establish feasibility through adequately detailed plans linked to major technical barriers. The plan must address the questions of “what, how, where, when, why, and by whom” in substantial detail. The Program will assess the proposing team’s relevant experience for pursuing the technical plan. The team carrying out the work must demonstrate a high level of scientific/technical expertise to conduct the R&D and have access to the necessary research facilities.

(b) Potential for Broad-Based Economic Benefits (50%)

The proposed technology must have a strong potential to generate substantial benefits to the nation that extend significantly beyond the direct returns to the proposing organization(s). The proposal must explain why ATP support is needed and what difference ATP funding is expected to make in terms of what will be accomplished with the ATP funding versus without it. The pathways to economic benefit must be described, including the proposer’s plan for getting the technology into commercial use, as well as additional routes that might be taken to achieve broader diffusion of the technology. The proposal should identify the expected returns that the proposer expects to gain, as well as returns that are expected to accrue to others, i.e., spillover effects. The Program will assess the proposer’s relevant experience and level of commitment to the project and project’s organizational structure and management plan, including the extent to which participation by small businesses is

encouraged and is a key component in a joint venture proposal, and for large company single proposers, the extent to which subcontractor/subrecipient teaming arrangements are featured and are a key component of the proposal.

Sec. 295.7 Notice of Availability of Funds.

The Program shall publish at least annually a *Federal Register* notice inviting interested parties to submit proposals, and may more frequently publish invitations for proposals in the *Commerce Business Daily*, based upon the annual notice. Proposals must be submitted in accordance with the guidelines in the *ATP Proposal Preparation Kit* as identified in the published notice. Proposals will only be considered for funding when submitted in response to an invitation published in the *Federal Register*, or a related announcement in the *Commerce Business Daily*.

Sec 295.8 Intellectual Property Rights; Publication of Research Results.

- (a)(1) **Patent Rights:** Title to inventions arising from assistance provided by the Program must vest in a company or companies incorporated in the United States. Joint ventures shall provide to NIST a copy of their written agreement which defines the disposition of ownership rights among the members of the joint venture, and their contractors and subcontractors as appropriate, that complies with the first sentence of this paragraph. The United States will reserve a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any such intellectual property, but shall not, in the exercise of such license, publicly disclose proprietary information related to the license. Title to any such intellectual property shall not be transferred or passed, except to a company



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incorporated in the United States, until the expiration of the first patent obtained in connection with such intellectual property. Nothing in this paragraph shall be construed to prohibit the licensing to any company of intellectual property rights arising from assistance provided under this section.

- (2) **Patent Procedures:** Each award by the Program shall include provisions assuring the retention of a governmental use license in each disclosed invention, and the government's retention of march-in rights. In addition, each award by the Program will contain procedures regarding reporting of subject inventions by the funding Recipient to the Program, including the subject inventions of members of the joint venture (if applicable) in which the funding Recipient is a participant, contractors, and subcontractors of the funding Recipient. The funding Recipient shall disclose such subject inventions to the Program within two months after the inventor discloses it in writing to the Recipient's designated representative responsible for patent matters. The disclosure shall consist of a detailed, written report which provides the Program with the following: the title of the present invention; the names of all inventors; the name and address of the assignee (if any); an acknowledgment that the United States has rights in the subject invention; the filing date of the present invention, or, in the alternative, a statement identifying that the Recipient determined that filing was not feasible; an abstract of the disclosure; a description or summary of the present invention; the background of the present invention or the prior art; a description of the preferred embodiments; and what matter is claimed. Upon issuance of the patent, the funding Recipient or Recipients must notify the Program accordingly, providing it with the Serial Number of the patent as issued, the date of issuance, a copy of the disclosure as issued, and if appropriate, the

name, address, and telephone number(s) of an assignee.

- (b) **Copyrights:** Except as otherwise specifically provided for in an Award, funding Recipients under the Program may establish claim to copyright subsisting in any data first produced in the performance of the award. When claim is made to copyright, the funding Recipient shall affix the applicable copyright notice of 17 U.S.C. § 401 or § 402 and acknowledgment of Government sponsorship to the data when and if the data are delivered to the Government, are published, or are deposited for registration as a published work in the U.S. Copyright Office. The funding recipient shall grant to the Government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, perform publicly and display publicly, and for data other than computer software to distribute to the public by or on behalf of the Government.
- (c) **Publication of Research Results:** The decision on whether or not to publish research results will be made by the funding Recipient(s). Unpublished intellectual property owned and developed by any business or joint research and development venture receiving funding or by any member of such a joint venture may not be disclosed by any officer or employee of the Federal Government except in accordance with a written agreement between the owner or developer and the Program. The licenses granted to the Government under section 295.8(b) shall not be considered a waiver of this requirement.

Sec. 295.9 Protection of Confidential Information.

As required by section 278n(d)(5) of Title 15 of the United States Code, the following information obtained by the Secretary on a confidential basis in connection with the activities of any business

or joint research and development venture receiving funding under the program shall be exempt from disclosure under the Freedom of Information Act—

- (1) Information on the business operation of any member of the business or joint venture;
- (2) Trade secrets possessed by any business or any member of the joint venture.

Sec. 295.10 Special Reporting and Auditing Requirements.

Each award by the Program shall contain procedures regarding technical, business, and financial reporting and auditing requirements to ensure that awards are being used in accordance with the Program's objectives and applicable Federal cost principles. The purpose of the technical reporting is to monitor "best effort" progress toward overall project goals. The purpose of the business reporting system is to monitor project performance against the Program's mission as required by the Government Performance and Results Act (GPRA) mandate for program evaluation. The audit standards to be applied to ATP awards are the Government Auditing Standards (GAS) issued by the Comptroller General of the United States (also known as yellow book standards) and the ATP program-specific audit guidelines. The ATP program-specific audit guidelines include guidance on the number of audits required under an award. In the interest of efficiency, the recipients are encouraged to retain their own independent CPA firm to perform these audits. The Department of Commerce's Office of Inspector General (OIG) reserves the right to conduct audits as deemed necessary and appropriate.

Sec. 295.11 Technical and Educational Services for ATP Recipients.

- (a) Under the Federal Technology Transfer Act of 1986, the National Institute of Standards and Technology of the Technology Administration

has the authority to enter into cooperative research and development agreements with non-Federal parties to provide personnel, services, facilities, equipment, or other resources except funds toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory. In turn, the National Institute of Standards and Technology has the authority to accept funds, personnel, services, facilities, equipment, and other resources from the non-Federal party or parties for the joint research effort. Cooperative research and development agreements do not include procurement contracts or cooperative agreements as those terms are used in sections 6303, 6304, and 6305 of title 31, United States Code.

- (b) In no event will the National Institute of Standards and Technology enter into a cooperative research and development agreement with a recipient of awards under the Program which provides for the payment of Program funds from the award recipient to the National Institute of Standards and Technology.
- (c) From time to time, ATP may conduct public workshops and undertake other educational activities to foster the collaboration of funding Recipients with other funding resources for purposes of further development and commercialization of ATP-related technologies. In no event will ATP provide recommendations, endorsements, or approvals of any ATP funding Recipients to any outside party.

Subpart B—Assistance to United States Industry-Led Joint Research and Development Ventures

Sec. 295.20 Types of Assistance Available.

This Subpart describes the types of assistance that may be provided under the authority of 15 U.S.C.

§ 278n(b)(1). Such assistance includes but is not limited to:

- (a) Partial start-up funding for joint research and development ventures.
- (b) A minority share of the cost of joint research and development ventures for up to 5 years.
- (c) Equipment, facilities, and personnel for joint research and development ventures.

Sec. 295.21 Qualifications of Proposers.

Subject to the limitations set out in section 295.3, assistance under this Subpart is available only to industry-led joint research and development ventures. These joint ventures may include universities, independent research organizations, and governmental entities. Proposals for funding under this Subpart may be submitted on behalf of a joint venture by a for-profit company or an independent research organization that is a member of the joint venture. Proposals should include letters of commitment or excerpts of such letters from all proposed members of the joint venture, verifying the availability of cost-sharing funds, and authorizing the party submitting the proposal to act on behalf of the venture with the Program on all matters pertaining to the proposal. No costs shall be incurred under an ATP project by the joint venture members until such time as a joint venture agreement has been executed by all of the joint venture members and approved by NIST. NIST will withhold approval until it determines that a sufficient number of members have signed the joint venture agreement. Costs will only be allowed after the execution of the joint venture agreement and approval by NIST.

Sec. 295.22 Limitations on Assistance.

- (a) An award will be made under this Subpart only if the award will facilitate the formation of a joint venture or the initiation of a new research and development project by an existing joint venture.

- (b) The total value of any in-kind contributions used to satisfy the cost-sharing requirement may not exceed 30 percent of the non-federal share of the total project costs.

Sec. 295.23 Dissolution of Joint Research and Development Ventures.

Upon dissolution of any joint research and development venture receiving funds under these procedures or at a time otherwise agreed upon, the Federal Government shall be entitled to a share of the residual assets of the joint venture proportional to the Federal share of the costs of the joint venture as determined by independent audit.

Sec. 295.24 Registration.

Joint ventures selected for funding under the Program must notify the Department of Justice and the Federal Trade Commission under the National Cooperative Research Act of 1984. No funds will be released prior to receipt by the Program of copies of such notification.

Sec. 295.25 Special Rule for the Valuation of Transfers Between Separately-Owned Joint Venture Members.

- (a) **Applicability.** This section applies to transfers of goods, including computer software, and services provided by the transferor related to the maintenance of those goods, when those goods or services are transferred from one joint venture member to other separately owned joint venture members.
- (b) **Rule.** The greater amount of the actual cost of the transferred goods and services as determined in accordance with applicable Federal cost principles, or 75 percent of the best customer price of the transferred goods and services, shall be deemed to be allowable costs; provided, however, that in no event shall the

aggregate of these allowable costs exceed 30 percent of the non-Federal share of the total cost of the joint research and development program.

- (c) **Definition.** The term *best customer price* shall mean the GSA schedule price, or if such price is unavailable, the lowest price at which a sale was made during the last 12 months prior to the transfer of the particular good or service.

Subpart C—Assistance to Single-Proposer U.S. Businesses

Sec. 295.30 Types of Assistance Available.

This Subpart describes the types of assistance that may be provided under the authority of 15 U.S.C. § 278n(b)(2). Such assistance includes but is not limited to entering into cooperative agreements with United States businesses, especially small businesses.

Sec. 295.31 Qualification of Proposers.

Awards under this Subpart will be available to all businesses, subject to the limitations set out in section 295.3 and 295.32.

Sec. 295.32 Limitations on Assistance.

- (a) The Program will not directly provide funding under this Subpart to any governmental entity, academic institution, or independent research organization.
- (b) For proposals submitted to ATP after December 31, 1997, awards to large businesses made under this Subpart shall not exceed 40 percent of the total project costs of those awards in any year of the award.
- (c) Awards under this Subpart may not exceed \$2,000,000, or be for more than 3 years, unless the Secretary provides a written explanation to the authorizing committees of both Houses of Congress and then, only after 30 days during which both Houses of Congress are in session. No funding for indirect costs, profits, or management fees shall be available for awards made under this Subpart.
- (d) The total value of any in-kind contributions used to satisfy a cost-sharing requirement may not exceed 30 percent of the non-Federal share of the total project costs.